IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 597

JAMES E. MILLS,
Appellant,

V.

STATE OF ALABAMA
Appellee

ON APPEAL FROM THE SUPREME COURT
OF ALABAMA

BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

I. The decision of the Supreme Court of Alabama reversed and remanded the action of the Jefferson County Criminal Court in sustaining Appellant's demurrers to the complaint filed against him. Therefore, the case must go back and be tried on its merits and final judgment of the Supreme Court of Alabama rendered before this Court can take jurisdiction.

II. Section 285 of the Alabama Corrupt Practices Act (Title 17, Section 285, Code of Alabama 1940) so far as it proscribes the publication of editorials on election day for or against particular candidates or for or against particular

propositions is a valid exercise of the police power of the State and therefore not contrary to the United States Constitution.

III. The terms "electioneering" and "solicitation of votes" are clear and definite to the point where there can be no doubt that they proscribe the publication on election day of editorials for or against particular candidates or for or against particular propositions.

ARGUMENT

I.

THERE HAS BEEN NO FINAL JUDGMENT OF THE SUPREME COURT OF ALABAMA WHICH CAN BE CONSIDERED BY THIS COURT UNDER TITLE 28, U. S. C. A. 1257, SINCE THE SUPREME COURT OF ALABAMA REVERSED AND REMANDED THE CASE TO TRIAL COURT WHERE FURTHER PROCEEDINGS CAN BE HAD.

The Jefferson County Criminal Court sustained a Demurrer to the Amended Complaint (R. 19-20), and the Supreme Court of Alabama reversed and remanded the case to the trial court (R. 24-33). There has been no trial on the merits, conviction of the appellant, appeal therefrom, or final judgment of the Supreme Court of Alabama on such appeal.

It may be that upon trial the Defendant will be acquitted on the merits, or it may happen that, for some reason, the trial will never take place. In either of these events, there can be no conclusive judgment against the Defendant in the case. Therefore, in its present posture, there has been no final judgment of the Supreme Court of Alabama which can be considered by this Court on appeal under Title 28, U. S. C. A.,

Section 1257. *Polakow's Realty Experts, Inc., v. State of Alabama*, 319 U. S. 750-751, 87 L. Ed. 1705; *Rankin v. Tennessee*, 11 Wall. (U. S.) 380, 21 L. Ed. 175; *Heike v. United States*, 217 U. S. 423, 54 L. Ed. 821, 30 S. Ct. 539; *Brown v. South Carolina*, 298 U. S. 639, 80 L. Ed. 1372, 56 S. Ct. 759; *Eastman v. Ohio*, 299 U. S. 505, 81 L. Ed. 374, 57 S. Ct. 21.

Neither *Pope v. Atlantic Coast Line Railroad Company*, 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed. 1094; *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69, 67 S. Ct. 156, 91 L. Ed. 80; *Local No. 438 Construction and General Laborers Union AFL-CIO v. S. J. Curry*, 371 U. S. 542, 83 S. Ct. 531, 9 L. Ed. 2d 514, nor *National Association for the Advancement of Colored People v. Button*, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405, cited by Appellant, was a criminal case which involved a Demurrer to a criminal charge as does the instant case.

Dombrowski v. Pfister, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22, cited by Appellant, was an injunction suit brought under the Civil Rights Act with regard to the validity of the Louisiana Subversive Control Act and was not decided in a state Supreme Court, but was instituted in a United States District Court and did not involve the question as to jurisdiction over an appeal from a final judgment of a state court.

It is difficult to understand why the Appellant cited the case of *Rosenblatt v. American Cyanamid Company*, — U. S. —, 86 S. Ct. 1, 15 L. Ed. 2d 192, in view of the fact that the case involved the constitutionality of process under the "long-arm statute" of New York, and this court dismissed the appeal for want of a substantial Federal question.

In his discussion of the jurisdictional question, the Appellant refers to "the blanket of silence which has descended

upon the press of Alabama each election day" and seems to assume that the voters are entitled to be influenced by electioneering or vote solicitation editorials on election day. This is the very evil which the statute seeks to prohibit and goes to the merits of the case rather than to the jurisdictional question.

II.

THE APPLICATION OF SECTION 285 OF THE ALABAMA CORRUPT PRACTICES ACT (TITLE 17, SECTION 285, CODE OF ALABAMA 1940) TO PROSCRIBE THE PUBLICATION OF A NEWSPAPER EDITORIAL ON ELECTION DAY URGING VOTERS TO VOTE FOR OR AGAINST A PARTICULAR CANDIDATE OR FOR OR AGAINST A PARTICULAR PROPOSITION IS NOT AN UNCONSTITUTIONAL INFRINGEMENT OF APPELLANT'S RIGHT OF FREE SPEECH GUARANTEED HIM BF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In his brief (P. 14), the Appellant concedes that the Corrupt Practices Act has a legitimate field of operation against which the state has a right to protect the public, but then proceeds to argue that because he is a newspaper editor, he is immune from the prohibitions of the Act and is at liberty to electioneer and solicit votes on election day when others are forbidden to do so. Why he should enjoy such a privileged status is not clear. If he is so privileged, would not radio and television commentators likewise be exempt from the operation of the statute?

The Appellant attempts to lump news and editorial comment in the same category and would lead the Court to believe that the Act has the effect of imposing a news blackout on election day in violation of the freedom of speech and

freedom of the press guaranties of the First Amendment (Appellant's brief, PP. 18-19). This is not so. The Act makes no attempt to stifle the dissemination of legitimate news. It merely bans the use of a newspaper to urge a particular course of action by voters on election day.

So-called "Corrupt and Illegal Practices Acts" are to be found in the laws of practically every state in the Union, in England, throughout the Colonies and in the Federal Statutes. 18 Am. Jur., Elections, Section 235, pages 336-337; 69 A. L. R. 377; 18 U. S. C. A. 591-612.

An interesting and comprehensive article by Honorable John S. Bottomly of Harvard and Boston Universities, entitled "Corrupt Practices in Political Campaigns," appears in Volume 30 at pages 331-381 of *Boston University Law Review*. After listing and discussing many practices at elections which have been prohibited by legislative Acts in England, by the United States Congress and by the legislatures of practically all of the states, he makes the following observation:

> "*SOLICITING VOTES ON ELECTION DAY.* A rather common provision of election laws is one which makes it unlawful to solicit votes within a certain *distance* of a polling place, usually 100 to 300 feet. Alabama, Montana, North Dakota and Oregon, however, have gone ever farther by prohibiting ALL solicitation or persuasion of voters on election day." (Emphasis supplied.)

So far as we can discover, there has never been any serious contention that the right of free speech would be violated by a law prohibiting solicitation of votes in the election booth or in close proximity thereto. Thus, unlimited free speech must be and has been temporarily interfered with when considering the matter of distance from and space around voting places at the time the election is being held. Should not such

reasonable policy regulations as to "politicking" on election day (the *time element*) be considered just as necessary as the *space* or *distance* element?

The fact that the law-making bodies of four states have prohibited all electioneering on election day is persuasive that such law-making bodies have deemed such laws to be a reasonable exercise of the police powers residing in them as representatives of the people.

The right of the people, through their Legislature, to impose reasonable regulations upon free speech or free press has been recognized. In the case of *Alabama State Federation of Labor v. McAdory*, 246 Ala. 1, 18 So. 2d 810, cert. dismissed, 325 U. S. 450, 65 S. Ct. 1384, 89 L. Ed. 1725, it was said:

> ". . . the state, under its police power, may enact laws which interfere indirectly and to a limited extent with the right of speech or the liberty of the people where they are reasonably necessary for the protection of the general public.
>
> "Where, as here, claims on behalf of free speech are met with claims on behalf of the authority of the State to impose reasonable regulations for the protection of the community as a whole, the duty of this court is plain. Whenever state action is challenged as a denial of 'liberty', the question always is whether the state has violated 'the essential attributes of that liberty' . . . while the right of free speech is embodied in the liberty safeguarded by the Due Process Clause, that clause postulates the authority of the states to translate, into law, local policies 'to promote the health, safety, morals and general welfare of the people . . . the limitation of this sovereign

power must always be determined with appropriate regard to the particular subject of its exercise.'

"Another principle which is recognized with practical unanimity and leading to the same end, is that the courts do not hold statutes invalid because they think there are elements herein which are violative of natural justice or in conflict with the court's notions of natural, social, or political rights of the citizen, not guaranteed by the constitution itself. Nor even if the courts think the act is harsh or in some degree unfair, and presents chances for abuse, or is of doubtful propriety. All of these questions of propriety, wisdom, necessity, utility, and expediency are held exclusively for the legislative bodies, and are matters with which the courts have no concern. This principle is embraced within the simple statement that the only question for the court to decide is one of power, not of expediency or wisdom."

In this connection, see *Flint v. Stone Tracy Company*, 220 U. S. 107, 31 S. Ct. 342, 55 L. Ed. 389, 420.

Freedom of speech is measured by public welfare and limited by it. The real question here on appeal is whether anyone can claim "freedom of speech" on election day in violation of a legislative pronouncement that such electioneering must cease on that day due to the potential disorder and unfairness and interference with voters that might arise from such unlimited "free speech." "Public welfare," in the way of unmolested voters on election day demands cessation of seeking votes by "electioneering" while ballots are being marked by the voters. The value to the public of the statute here under attack far outweighs the supposed infringement of the rights of the Appellant here. *Communist Party of the United States of America v. Subversive Activities Control Board*, 367 U. S. 1, 81 S. Ct. 1357, 1407, 6 L. Ed. 265.

The law cannot be held invalid because unreasonable, unless and until it appears beyond reasonable controversy that it unnecessarily impairs to the point of practical destruction a right safeguarded by the Constitution. A court may not declare a law void for unreasonableness because it is unwise or prescribes a limitation more restrictive than the court thinks proper. If a law is germane to the subject with which it deals, that is, is not passed for the purpose of securing some ulterior objective and is, in fact, within the field of regulation, if it tends to conserve rather than destroy, it is beyond the scope of judicial interference. *State ex rel. La-Follette, v. Kohler* (*Wisc.*) 228 N. W. 895, 69 A. L. R. 348, 376.

Against the impediments which particular governmental regulations (Corrupt Practices Acts) cause to entire freedom of individual action (in this case, seeking votes on election day by publishing and distributing an editorial in a newspaper), there must be weighed the value to the public of the ends which the regulation may achieve, (order, peace, quiet, the presentation of last minute political charges without opportunity to answer, etc.). The value to the public of the Corrupt Practices Act here under attack far outweighs the supposed infringement of the right of Appellant to solicit votes on an election day under the guise of free speech. *Schenck v. United States,* 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470, 473; *Dennis v. United States,* 341 U. S. 494, 71 S. Ct. 857, 95 L. Ed. 1137, 1153; *Communications Association v. Douds,* 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 925.

Free speech cases are not an exception to the principle that the courts are not legislatures, and that direct policymaking is not their province. How best to reconcile competing interests is the business of legislatures and the balance they strike is a judgment not to be disturbed by the courts, but to be re-

spected unless outside the pole of fair judgment. Unless there is want of reason in the legislative judgment, the courts will not declare such acts unconstitutional. In no case has this court held that a legislative judgment, even as to freedom of utterance, may be overturned merely because the court would have made a different choice between the competing interests had the initial legislative judgment been for it to make. The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest. *Dennis v. United States*, 341 U. S. 494 (538, 540), 95 L. Ed. 1137 (1168-1169).

The idea behind this legislation evidently was to prevent the voters from being subjected to unfair pressure and "brainwashing" on the day when their minds should remain clear and untrammeled by such influences, just as this court is insulated against further partisan advocacy once these arguments are submitted.

III.

SECTION 285 OF THE ALABAMA CORRUPT PRACTICES ACT (TITLE 17, SECTION 285, CODE OF ALABAMA 1940) IS NOT SO VAGUE AND INDEFINITE AS TO FAIL TO INFORM APPELLANT WHAT CONDUCT WILL RENDER HIM LIABLE TO ITS PENALTIES.

The words "electioneering" and "solicitation of votes" are clear enough in and of themselves to require no further definition. Webster's New International Dictionary defines the word "electioneer" to mean "to work for, or in the interest of, a person, ticket, party, or the like in an election." The term "solicitation of votes" can have only one meaning.

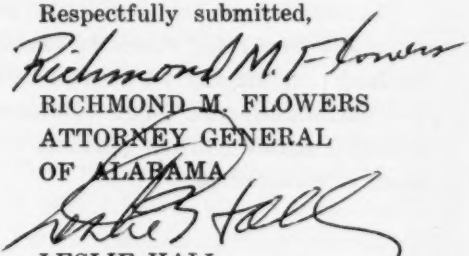
The Appellant, in the main part of his argument, shows a clear understanding of these terms, but he argues repeatedly that he, and he alone, is free to do these things on election day.

There is no unconstitutional vagueness or indefiniteness about terms which are so well understood.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal should be dismissed or that the decision of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,



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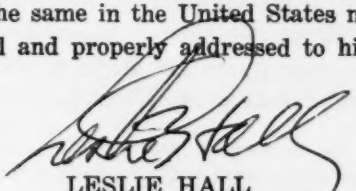
CERTIFICATE OF SERVICE

I, Leslie Hall, one of the Attorneys for the Appellee, and a Member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of March, 1966, I served the requisite number of copies of the foregoing brief of Appellee upon Kenneth Perrine, 933 Bank for Savings Building, Birmingham, Alabama 35203, Attorney for Appellant, by depositing the same in the United States mail, first class postage prepaid and properly addressed to him at the address given.



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